Office - Supreme Court, U.S.
FILED
DEC 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-79

In the Supreme Court of the United States

OCTOBER TERM, 1981

MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether proceedings in federal court under the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 101 *et seq.*, preempt state court liquidation or insolvency proceedings under the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et. seq.* (1979 & Cum. Supp. 1981).

2. Whether the bankruptcy court has the power, under 11 U.S.C. (Supp. IV) 105(a), to enjoin state liquidation proceedings, even assuming such proceedings are within the exception to the automatic stay provision of the Bankruptcy Code for actions by "a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	4
Argument	9
Conclusion	16

TABLE OF AUTHORITIES

Cases:

CFTC v. *Incomco, Inc.*, 649 F.2d 128	13
Chandler v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74	15
Christy, Ex parte, 44 U.S. (3 How.) 292	14
Fahey, Ex parte, 332 U.S. 258	14
Gorenz v. *Illinois Department of Agriculture*, 653 F.2d 1179	15, 16
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U.S. 734	9
Kerr v. *United States District Court*, 426 U.S. 394	14-15
Lawn v. *United States*, 355 U.S. 339	10
Mansfield Tire & Rubber Co., In re, 660 F.2d 1108	15
NLRB v. *Evans Plumbing Co.*, 639 F.2d 291	13
Parr v. *United States*, 351 U.S. 513	14
Perez v. *Campbell*, 402 U.S. 637	9
Reading Co. v. *Brown*, 391 U.S. 470	10-11
Republic of Peru, Ex parte, 318 U.S. 578	14, 15
SEC v. *First Financial Group of Texas*, 645 F.2d 429	13, 14
United States v. *Lovasco*, 431 U.S. 783	10
United States v. *United Mine Workers of America*, 330 U.S. 258	15
Watts & Sachs, In re, 190 U.S. 1	9
Will v. *United States*, 389 U.S. 90	15

Constitution and statutes:

United States Constitution:

Article I, Section 8, Clause 4 (Bankruptcy Clause) 2, 9
Article VI, Clause 2 (Supremacy Clause) 2, 9

Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 101 *et seq.* 4

11 U.S.C. (Supp. IV) 105(a) 2, 14
11 U.S.C. (Supp. IV) 362 2
11 U.S.C. (Supp. IV) 362(b)(4) 7, 12, 13
11 U.S.C. (Supp. IV) 363(f)(4) 5
11 U.S.C. (Supp. IV) 541 ..... 7, 9
11 U.S.C. (Supp. IV) 543 14

Pub. L. No. 95-598, Section 405(c)(1), 92 Stat. 2685 15
28 U.S.C. (Supp. III) 1471(e) 3, 7, 9, 10
Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981) 4, 6, 11

§ 411.519.6 (1979) 3, 4, 7, 11, 12

Miscellaneous:

124 Cong. Rec.:

H11088 (daily ed. Sept. 28, 1978) 10
H11107-H11108 (daily ed. Sept. 28, 1978) 10
S17425 (daily ed. Oct. 6, 1978) 10

S. 863, 97th Cong., 1st Sess. § 220(e) (1981) 10
S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978) 14
S. Rep. No. 97-150, 97th Cong., 1st Sess. (1981) .. 10
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 15

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-79

MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-21) is reported at 647 F.2d 768. The opinion of the district court (Pet. App. A-23 to A-40) is reported at 7 Bankr. Rep. 974.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1981. On July 1, 1981, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1981. The peti-

tion was filed on July 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides:

> The Congress shall have Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States * * *.

2. Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 105(a) of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 105(a), provides:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

4. Section 362 of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 362, provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or

other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * * * *

(3) any act to obtain possession of property of the estate or of property from the estate;

* * * * *

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

* * * * *

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; * * *.

5. 28 U.S.C. (Supp. III) 1471(e) provides:

The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

6. Mo. Rev. Stat. § 411.519.6 (1979) provides:

If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law.

STATEMENT

Robert James, Don James, G. E. James and James Agri-Center, Inc., a corporation affiliated with the foregoing individuals (the debtors), operated public grain elevators in Arkansas and Missouri (Pet. App. A-3). The value of the grain contained in their Missouri elevators alone was estimated at $5,000,000. The State of Missouri concedes that the debtors owned at least 2.3% of that grain, a property interest of approximately $115,000 (Pet. App. A-6). On August 11, 1980, the debtors filed proceedings pursuant to the Bankruptcy Reform Act of 1978 (the Bankruptcy Code), 11 U.S.C. (Supp. IV) 101 *et seq.*, in the bankruptcy court for the Eastern District of Arkansas.[1]

The next day, the State of Missouri obtained orders from the state circuit courts for the counties in which the debtors' Missouri grain elevators were located appointing the Director of the Missouri Department of Agriculture receiver of the debtors' Missouri grain elevators under § 411.519.6, the insolvency provision of the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981). The state court orders authorized the Director of the Missouri Department of Agriculture, as receiver, to " 'carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interests of those individuals storing

---

[1] The individual debtors initially filed liquidation proceedings under Chapter VII of the Bankruptcy Code, which they subsequently converted to reorganization proceedings under Chapter XI. The corporate debtor at the outset filed for reorganization under Chapter XI (Pet. App. A-3).

grain in said facilit[ies]' " (Pet. App. A-4; Br. Opp. App. A-1 to A-3, A-23 to A-26).[2]

On August 15, 1980, the bankruptcy court appointed respondent Robert P. Lindsey trustee in bankruptcy, and on August 29, 1980, the bankruptcy court ordered Lindsey to assume certain grain purchase contracts that the debtors had entered into prior to bankruptcy. Approximately two weeks later, several farmer depositors, believing that the order deprived them of their rightful possession of their grain, seized and blockaded part of the debtors' Missouri facilities in an attempt to prevent the trustee from carrying out the bankruptcy court's order. On the order of the bankruptcy court, United States marshals interceded and broke the blockade (Pet. App. A-4 to A-5; Br. Opp. App. A-29 to A-31).

On September 23, 1980, the trustee initiated an adversary action in the bankruptcy court and sought leave to sell the grain stored in the debtors' warehouses pursuant to 11 U.S.C. (Supp. IV) 363(f)(4). He alleged that there was a genuine dispute concerning ownership of the grain and that the cost of storage, market conditions, and the risk of deterioration of the grain favored such a sale, the proceeds of which would be distributed after ownership rights in the grain were determined (Pet. App. A-6).

A hearing on the trustee's action was scheduled for October 27, 1980 (Pet. App. A-29). On October

---

[2] "Br. Opp." and "Br. Opp. App." refer to the brief in opposition filed in this Court by the trustee and the "Arkansas Farmers" and the appendix attached thereto.

On August 8, 1980, the debtors had authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses pursuant to Missouri law empowering the State to operate and liquidate insolvent grain warehouses (Pet. App. A-4 & n.6, A-24 to A-25).

20, however, the State filed suit against the trustee and the debtors in state court. The state court, asserting exclusive jurisdiction of the grain located in Missouri pursuant to the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981), authorized the Director of the Missouri Department of Agriculture to "seize, by physical means, if required" the debtors' Missouri grain warehouses and the grain and records contained in them, and entered an ex parte temporary restraining order enjoining the debtors and the trustee from taking any action respecting the Missouri grain, from prosecuting the pending bankruptcy case, or from seeking to hold the State of Missouri or its Director of Agriculture in contempt of any court (Pet. App. A-7, A-29 to A-30; Br. Opp. App. A-36 to A-43).

On the same day the state order issued, the bankruptcy judge advised counsel for the State that contempt proceedings against its Director of Agriculture would be heard in the bankruptcy court on October 22, 1980 (Pet. App. A-7). In response, the State petitioned the United States Court of Appeals for the Eighth Circuit for a writ of prohibition staying the bankruptcy court proceedings. The court of appeals denied the State's petition on October 21, 1980, without prejudice to the State's filing such a petition in the United States District Court for the Eastern District of Arkansas, but stayed the contempt proceedings and other matters before the bankruptcy court pending further order (*ibid.*).

The State then filed the present action, seeking a writ of prohibition from the district court (Pet. App. A-41 to A-69). That court denied the State's petition for a writ of prohibition (*id.* at A-23 to A-40), holding (*id.* at A-34) that "at the very least, the Bankruptcy Court has jurisdiction to resolve the

competing claims to the property in question by scrutinizing the respective legal and equitable interests and [to] decide whether the debtors' interest is such that it is property of the estate within the meaning of [11 U.S.C. (Supp. IV) 541]." The district court rejected Missouri's contention that its actions came within the exception to the automatic stay provision for actions taken by a governmental unit to enforce its "police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)) on the ground that the State's "sole objective is to protect the pecuniary interests in property of purported depositors" (Pet. App. A-35). Finally, the court held that under the Supremacy Clause, the Bankruptcy Code preempted the insolvency provision of the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.519.6 (1979), because that provision conflicted with the pending bankruptcy proceeding (Pet. App. A-37 to A-38).

The Eighth Circuit denied a second petition for a writ of mandamus addressed to it and affirmed the decision of the district court (Pet. App. A-1 to A-21). At the outset, the court recognized (*id.* at A-10 to A-11) the exclusive jurisdiction of the bankruptcy court over the "property" and "estate" of the debtors under 11 U.S.C. (Supp. IV) 541 and 28 U.S.C. (Supp. III) 1471(e). Although the court noted (Pet. App. A-15) that Missouri's grain laws are "regulatory in nature," it concluded (*ibid.*) that because Missouri's grain laws "govern[] the operation and liquidation of grain warehouses, [they] directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception." In the alternative, the court held (Pet. App. A-15) that because "a bank-

ruptcy action preempts state insolvency proceedings" Missouri's "attempted enforcement of its insolvency laws does not oust the bankruptcy court of jurisdiction." Thus, the court continued (*ibid.*; footnote omitted),

> [t]he bankruptcy court could take appropriate steps to protect its jurisdiction over the estate, regardless of whether a proceeding falls within the section 362(b)(4) exception. For example, the court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. [(Supp. IV)] § 105(a).

Finally, the court observed (Pet. App. A-20) that "Missouri officials should have presented the issues raised in [this] proceeding to the bankruptcy court in the first instance. If dissatisfied with the result, an appeal could have been taken."

The court vacated the stays of the bankruptcy court proceedings it had entered (Pet. App. A-21), and petitioners did not seek a stay of the court of appeals' decision. Accordingly, on May 27, 1981, the bankruptcy court entered an order authorizing the trustee, after notice to all parties and a hearing, to sell the grain located in the Missouri warehouses (Br. Opp. App. A-58 to A-69).[3] Pursuant to that order, the trustee sold all of the Missouri grain on June 26, 1981 (*id.* at A-90 to A-97; Br. Opp. 16).

---

[3] The court of appeals had lifted its stay with respect to the grain located in Arkansas and had permitted the sale of that grain on February 4, 1981 (Br. Opp. App. A-47 to A-55).

ARGUMENT

The discretionary refusal of the courts below to issue a writ of prohibition staying the federal bankruptcy proceedings was proper, and that decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Under the Supremacy Clause and the Bankruptcy Clause of the Constitution, Article VI, Clause 2 and Article I, Section 8, Clause 4, the Bankruptcy Code supersedes any state law or proceeding that would conflict or interfere with proceedings under the Code or with Congress' purposes in enacting that legislation. See *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-738 (1931); *In re Watts & Sachs*, 190 U.S. 1, 27 (1903). Because the bankruptcy court had jurisdiction over the debtors' grain located in Missouri, and because state insolvency proceedings would have interfered with that jurisdiction, the state proceedings were preempted by the federal proceedings and, a fortiori, Missouri's petitions for a writ of prohibition were properly denied.

a. The grain located in Missouri was in the debtors' possession at the time they filed their petitions in bankruptcy. That fact alone rendered the grain subject to the exclusive jurisdiction of the bankruptcy court under 28 U.S.C. (Supp. III) 1471(e). See Historical and Revision Notes to 11 U.S.C. (Supp. IV) 541 ("[t]he debtor's interest in property * * * includes * * * a possessory interest * * *").[4]

[4] Petitioners claim (Supp. Br. 7-8) that the court of appeals erroneously relied on 11 U.S.C. (Supp. IV) 541, which defines the property of the estate, to uphold the bankruptcy court's jurisdiction over the Missouri grain. Petitioners contend that 28 U.S.C. (Supp. III) 1471(e) limits the

Moreover, the State concedes that the debtors owned 2.3% of the grain located in Missouri, the total value of which was estimated at $5,000,000

---

jurisdiction of the bankruptcy court to "the property * * * of the debtor," which, according to petitioners, is less than the whole of the property of the estate. Because petitioners did not raise this issue in the court of appeals, they are foreclosed from raising it in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, the claim is without merit. It is difficult to imagine how the bankruptcy court could function if its jurisdiction did not extend to all of the property of the estate, and the legislative history clearly shows that Congress did not intend an artificial limit of the kind advocated by petitioners. The statement that was read into the Congressional Record in both Houses of Congress in lieu of a conference report (124 Cong. Rec. H11088 (daily ed. Sept. 28, 1978) (remarks of Rep. Rousselot)) explains that

> [t]he bankruptcy court is * * * given pervasive jurisdiction over all proceedings arising in or relating to bankruptcy cases. In addition, the bankruptcy court is given exclusive jurisdiction of the property of the estate in a case under title 11.

124 Cong. Rec. H11107-H11108 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); accord, 124 Cong. Rec. S17425 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

We also note that § 220(e) of S. 863, 97th Cong., 1st Sess. (1981), a bill "[t]o establish a uniform law on the subject of bankruptcies," would eliminate any possible confusion on this subject by adding, at the end of 28 U.S.C. (Supp. III) 1471(e), the phrase "and of all property, wherever located, of the estate in such case." The Senate report accompanying S. 863, S. Rep. No. 97-150, 97th Cong., 1st Sess. 21 (1981), states that § 220(e) merely "corrects a typographical error," making clear that the amendment was not intended to alter existing law.

Finally, contrary to petitioners' suggestion (Supp. Br. 7), the distinction drawn by this Court in *Reading Co.* v.

(Pet. App. A-6). In addition, "[o]ther parties claiming ownership of the grain include Missouri and Arkansas farmer-producers, the Commodity Credit Corporation, and the First Tennessee Bank, N.A., Memphis" (*ibid.*). Because only the bankruptcy court was authorized by Congress to determine these competing claims, the court of appeals correctly held that the State of Missouri could not interfere with the orderly administration of the debtors' petitions in the bankruptcy court.

b. Contrary to petitioners' bare assertions (Reply Br. 2-3), the action initiated by Missouri in state court under the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981), was in the nature of an insolvency or liquidation proceeding. The State's initial pleading alleged the insolvency of the debtors and sought the appointment of the Director of the Department of Agriculture of Missouri as receiver "to take possession of the public grain warehouse to operate or liquidate the warehouse in accordance with laws as may be appropriate" (Br. Opp. App. A-2). Similarly, the state court orders granting Missouri's requests for appointment of a receiver (Br. Opp. App. A-23 to A-26) did so pursuant to Mo. Rev. Stat. § 411.519.6 (1979), the insolvency provision of Missouri's Grain Warehouse Law (see page 3, *supra*). Those orders required the receiver to "make an audit and full investigation of the financial circumstances of [the debtors] and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of

---

Brown, 391 U.S. 470 (1968), was between a pre-petition debt of the bankrupt and a post-petition debt incurred by the estate (*id.* at 482). Moreover, in that case the Court was construing the predecessor statute to the Bankruptcy Reform Act of 1978, which controls the present case.

those individuals storing grain in said facility" (Br. Opp. App. A-23). Moreover, although petitioners assert (Reply Br. 3) that the nature of the proceedings filed by them in state court underwent a change between their August 1980 petitions for appointment of a receiver and their October 1980 petition for immediate possession and an injunction, the order to show cause, temporary restraining order and seizure order that petitioners obtained in state court on October 20, 1980, were based in large part on the orders of receivership entered pursuant to Mo. Rev. Stat. § 411.519.6 (1979) (Br. Opp. App. A-37 to A-38, A-40 to A-42).

2. Because, as we have shown above (pages 9-11, *supra*), the federal court proceedings under the Bankruptcy Code preempt the state court proceedings, this case does not present an appropriate vehicle in which to test the limits of the exception to the automatic stay provision for actions by "a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)).[5] Even assuming, however, that Mis-

[5] Indeed, the court of appeals appears to have based its holding that Missouri's action did not come within the exception in 11 U.S.C. (Supp. IV) 362(b)(4) on preemption grounds, stating (Pet. App. A-15; emphasis added) that "Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, *therefore*, do not fall within the section 362(b)(4) exception." It was in the same context that the court below stated (Pet. App. A-15) that Section 362(b)(4) did not extend to Missouri's grain laws because they "primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health." In our view, protection of some private, pecuniary interest is involved in many governmental actions, and that fact alone does not exclude those actions from Section 362(b)(4). As the court of appeals recognized (Pet. App. A-14 to A-16), however, Section

souri's actions are within Section 362(b)(4)'s exception to the *automatic* stay provision, as the court of appeals correctly observed (Pet. App. A-16; foot-

---

362(b)(4) cannot accommodate actions by governmental units that would conflict with the provisions or the purposes of the Bankruptcy Code.

In any event, the cases on which petitioners rely (Supp. Br. 3-4 & n.**) do not evidence a conflict among the circuits concerning the scope of Section 362(b)(4). In *CFTC* v. *Incomco, Inc.*, 649 F.2d 128 (2d Cir. 1981), the court of appeals agreed with the Commodity Futures Trading Commission (CFTC) that its actions to obtain access to the books and records relating to the defendants' commodity futures trading business and to obtain appointment of an equitable receiver came within 11 U.S.C. (Supp. IV) 362(b)(4)'s exception to the automatic stay provision. There is nothing in that decision, however, that suggests that the CFTC's actions would have interfered with the voluntary bankruptcy proceedings filed after the Commission had instituted its actions. To the contrary, the district court had entered the requested injunction relating to the inspection of the defendants' books and records " '*in aid* of the Bankruptcy Court' " (649 F.2d at 131; emphasis added).

Nor does the decision in this case conflict with *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). There, the Fifth Circuit held that the filing of a bankruptcy petition did not bar the NLRB from exercising its jurisdiction over unfair labor practice charges and that the court could enter an enforcement order for injunctive relief and back pay. The court of appeals expressly pointed out (*id.* at 293 & n.3), however, that it was not deciding "whether an action to execute or enforce a money judgment would be exempt from the automatic stay" or "whether the bankruptcy court has power under [11 U.S.C. (Supp. IV) 105(a)] to issue a discretionary stay notwithstanding the exemption of the Board's action from the automatic stay." Similarly, in *SEC* v. *First Financial Group of Texas*, 645 F.2d 429 (1981), the Fifth Circuit held that Section 362(b)(4) permitted the SEC to obtain appointment of a temporary receiver in proceedings ancillary to civil enforcement proceedings in order to "prevent dismemberment of the corporate estate by management personnel who have been found to have acted fraudu-

note omitted; emphasis added), "the bankruptcy court possesses power *in its discretion* to enjoin state courts, officials, and agencies from interfering with assets in [the] custody of the bankruptcy court." That discretionary power arises out of 11 U.S.C. (Supp. IV) 105(a), which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." As the legislative history makes explicit, 11 U.S.C. (Supp. IV) 105(a)'s broad grant of discretionary power includes "authorization * * * for a court of the United States to stay the action of a state court." S. Rep. No. 95-989, 95th Cong., 2d Sess. 29 (1978). See also *SEC* v. *First Financial Group of Texas*, 645 F.2d 429, 440 (5th Cir. 1981).

3. In sum, the court of appeals did not abuse its discretion by refusing to issue the extraordinary writ of prohibition. Writs of prohibition and mandamus "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947). The power to issue such writs "is discretionary and it is sparingly exercised." *Parr* v. *United States*, 351 U.S. 513, 520 (1956). Hence, a writ of prohibition is available only when an inferior court has wholly exceeded its jurisdiction. See *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943); *Ex parte Christy*, 44 U.S. (3 How.) 292, 322 (1845); cf. *Kerr* v. *United States*

---

lently and who could otherwise easily dispose of the assets to the detriment of the debtor's creditors" (645 F.2d at 439). The court noted (*id.* at 440), however, that if the ancillary proceedings actually "threaten[ed] the assets of the debtor's estate" the bankruptcy court could stay them under 11 U.S.C. (Supp. IV) 105(a) or require the debtor's assets to be turned over to the trustee under 11 U.S.C. (Supp. IV) 543.

District Court, 426 U.S. 394, 402 (1976) (writ of mandamus); *Will* v. *United States*, 389 U.S. 90, 95 (1967) (same). See also R. Stern & E. Gressman, *Supreme Court Practice* 634-639 (5th ed. 1978). Because, as we have shown above (pages 9-14, *supra*), the bankruptcy court had jurisdiction of the Missouri grain, the courts below acted well within their discretion in denying the petitions for a writ of prohibition.

We further note that petitioners failed to raise any of the jurisdictional arguments presented in the petition for a writ of certiorari in the bankruptcy court, which plainly had jurisdiction to rule on the scope of its own jurisdiction. See, *e.g.*, *United States* v. *United Mine Workers of America*, 330 U.S. 258, 290-293 (1947). Nor did petitioners attempt to avail themselves of the Bankruptcy Code's provisions for appeal from an adverse order of the bankruptcy court to a three bankruptcy judge panel, the district court or the court of appeals. See Section 405(c)(1) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2685. In these circumstances, issuance of a writ of prohibition would have been clearly inappropriate. See, *e.g.*, *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970); *Ex parte Republic of Peru*, *supra*, 318 U.S. at 584.[6]

---

[6] Petitioners recently filed a Second Supplemental Brief in support of their petition, but the cases cited therein do not advance their contentions. The court in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), simply held that the Ohio workers' compensation scheme came within the exception to the automatic stay as a lawful exercise of the state's police power to adjudicate such claims, noting (*id.* at 1113) that any employees' claims would be paid from the state insurance fund or bonds posted by the employer, so that the debtor's bankruptcy estate would be wholly unaffected.

Gorenz v. *Illinois Department of Agriculture*, 653 F.2d 1179 (7th Cir. 1981), was a bankruptcy case involving

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

DECEMBER 1981

---

warehoused grain, but there the similarity to this case ends. Illinois had seized grain from a warehouseman prior to bankruptcy, liquidated it, and retained the proceeds, presumably for distribution to farmers who had deposited their grain with the warehouseman. The trustee filed a complaint in the bankruptcy proceeding for an accounting and obtained a turnover order for the grain proceeds held by Illinois. The Seventh Circuit reversed the turnover order and remanded for further proceedings to allow the trustee to make a showing "that the property or proceeds in question [were] a part of the bankrupt's estate." *Id.* at 1184. In *Gorenz*, "the bankruptcy court did not have actual or constructive possession of the grain proceeds" (*id.* at 1182) and the state denied that the debtor had *any* ownership interest in them (*id.* at 1183).

The facts in the instant case present a stark contrast. Here, the grain was in the possession of the debtor at the time the bankruptcy petition was filed and the State of Missouri *conceded* that the debtor had an ownership interest in the grain of at least 2.3%. Further, the question of ownership in *Gorenz* was being tested in the appropriate forum—the bankruptcy court. In this case, the State of Missouri seeks to resolve this issue by inappropriate means—through extraordinary writs of prohibition and state insolvency proceedings. Finally, *Gorenz* was decided under the prior bankruptcy Act (653 F.2d at 1180 n.1).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 389974 727